UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 15

CABAL INDUSTRIES Employer and CEMENT MASONS LOCAL 567, a/w OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND CANADA, AFL-CIO[1] Petitioner	Case No. 15-RC-8662

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held June 12, 2006 before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board, to determine an appropriate unit for collective bargaining.[2]

I. ISSUES

Cement Masons, Local 567, a/w Operative Plasterers and Cement Masons International Association of the United States and Canada, AFL-CIO (herein called the

[1] The name of the Petitioner has been corrected to reflect its full legal name.
[2] Upon the entire record in this proceeding, the undersigned finds:
a. The hearing officer's rulings made at the hearing are free from error and are herby affirmed.
b. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
c. The labor organization involved claims to represent certain employees of the Employer.
d. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6)(7) of the Act.

Petitioner), seeks an election within a unit comprised of regular full and part time cement masons and apprentice cement masons employed by the Employer, Cabal Industries. On May 31, 2006, the Employer was served with a copy of the petition herein and a notice that a hearing regarding the petition would occur at the Regional Office on June 12, 2006. This notice of hearing was served upon the Employer both by facsimile and first class United States Mail.[3] However, neither the Employer's owner nor any other representative of the Employer appeared at the hearing. A hearing was conducted during which evidence was received regarding the effect of the Employer's business upon interstate commerce; the status of the Petitioner as a labor organization; and evidence concerning the appropriateness of the petitioned unit.[4]

II. DECISION

For the reasons discussed in detail below, it is concluded that the Board has jurisdiction over Cabal Industries; that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act; and that the petitioned for unit of employees constitutes a unit appropriate for the purposes of collective bargaining.

The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time Cement Masons and Apprentice Cement Masons employed by the Employer; Excluding all foremen, all superintendents, all office clerical employees, professional employees, managerial employees, guards and supervisors as defined by the Act.

[3] I note that, prior to the hearing and at my direction, a Board Agent spoke with the Employer's owner and advised her of the hearing and the Employer was sent two separate letters by facsimile reminding the Employer of the upcoming hearing. Neither the Employer nor any representative of the Employer ever advised the Region that it would not be able to attend the hearing.

[4] As noted, the Employer failed to participate in the instant hearing. The Union's business representative was the only witness who testified at the hearing. His testimony was based on his personal observations, conversations with several of the Employer's supervisors, and conversations with employees. Additionally, where appropriate, documentary evidence was received.

The unit found appropriate herein consists of approximately 20 employees. There is no prior history of collective bargaining. However, on September 22, 2003, in Case Number 15-RC-8484, the Petitioner had filed a previous petition. As a result of that petition, a stipulated election agreement was reached[5] and an election among the employees was held on October 17, 2003. The Petitioner did not receive a majority of votes in that election.

III. STATEMENT OF FACTS

A. The Business Operations of the Employer

The Employer is a contractor located in Jefferson Parish, Louisiana and engaged in the business of pouring and finishing concrete for highway work, roadway work, driveways, curb and gutter bottoms, sidewalks and house slabs. The Employer is owned by Mary Cabal. Cabal, one superintendent, three foremen, and approximately 20 employees comprise the Employer's current workforce. The employees make between $13.00 and $16.00 an hour and the foremen make between $20.00 and $25.00 an hour. The wages of the Superintendent are not known. The 20 employees work a standard 40 hour work week with at least five hours of overtime worked by each employee.

B. The Employer's Relationship to Interstate Commerce

At the time of the hearing, the Employer was working as a subcontractor for the general contractor, Boh Brothers, on a project for the U.S. Army Corps of Engineers.

[5] In the stipulated election agreement in Case Number 15-RC-8484, the parties stipulated that the Employer was engaged in building and construction for commercial customers and annually purchased and received materials valued in excess of $50,000 directly from suppliers located within the State of Louisiana, who in turn received such materials directly from points located outside the State of Louisiana. The parties also stipulated that the appropriate

This project is to elevate approximately a mile of the roadway in Harvey, Louisiana and the Employer is also pouring and finishing the driveways and curbs. The Employer has its cement delivered by three different ready mix companies but it is unknown from what state the ready mix cement is purchased. The contractor's rate for purchasing concrete is $60.00 a yard. The business manager for the Petitioner testified that based on the labor costs and the cost of purchasing the concrete, the Employer has at least $125,000 worth of work on this project for the U.S. Army Corps of Engineers.

The Employer has had at least two other projects in the past year. One of these projects was for the Housing Authority of New Orleans and the other project was for the State of Louisiana. For the Housing Authority project, the Employer was, again, a subcontractor for the general contractor, Boh Brothers.[6] The Housing Authority project lasted approximately six months and employed ten employees who made $15.00 or $16.00 an hour. Approximately 350 yards of concrete were used for this project. Based on these figures, the total cost of the project would be greater than $50,000.

For the project for the State of Louisiana, the Employer was, again, a subcontractor for Boh Brothers. This project involved redoing a road, curbs, gutters, and the sidewalks for an unknown number of blocks on a street in Metairie, Louisiana. It is unknown approximately how long this job lasted or how many employees were employed on this job or how much concrete was used on this job.

C. Labor Organization Status

The Petitioner is a local union affiliate of the Operative Plasterers and Cement Masons International Association of the United States and Canada, AFL-CIO which has

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collective-bargaining unit would include all concrete workers and exclude all office clerical employees, professional employees, guards and supervisors as defined in the Act.

been recognized by the Board as a labor organization within the meaning of Section 2(5) of the Act for many years.[7] Employees attend monthly union meetings and elect officers. Finally, the Petitioner negotiates with employers collective bargaining agreements that address employee wages, benefits, working conditions, and hours of employment, among other subjects.

IV. DISCUSSION

A. The Jurisdictional Issue

As addressed in Tropicana, the Board will assert jurisdiction over an employer who has refused to provide information to enable the Board to determine whether the Employer meets the Board's jurisdictional standards, if the record at a hearing establishes that the Board has statutory jurisdiction. Tropicana Products, 122 NLRB 121 (1958). This rule was fashioned to advance the policies underlying the Act and promote the prompt resolution of cases. The Act extends jurisdiction to all cases involving the enterprises whose operations affect interstate commerce. The Board's jurisdiction has been construed to extend to all such conduct as might constitutionally be regulated under the commerce clause, subject only to the rule of *de minimus*, NLRB v. Fainblatt, 306 U.S. 601, 606 (1939). This rule provides that the Board will assert jurisdiction over an employer whose impact upon interstate commerce is more than *"de minimus."* The Board has held that revenues as little as $1,500 derived from interstate commerce are a sufficient basis for the Board's assertion of statutory jurisdiction, Marty Levitt, 171 NLRB 739 (1968); Pet Inn's Grooming Shoppe, 220 NLRB 828 (1975).

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[6] This project was to pour sidewalks at the Melpomene Housing Project located in New Orleans, LA.
[7] Cement Masons Local Union 502, 333 NLRB 815 (2001); Hyde Park Construction Company, 258 NLRB 849 (1981); Charles E. Forrester, 189 NLRB 519 (1971).

As in Tropicana, the Employer here failed to appear at the hearing to provide information necessary to determine whether its operations satisfy the Board's jurisdictional standards. In the absence of the Employer, indirect testimonial evidence was received from the business manager of the Petitioner concerning the number of projects that the Employer performed in the past year; the entities for which the Employer performed the work; and the approximate cost of the Employer's materials and labor for the projects. That evidence indicates that the Employer has a more than *de minimus* impact upon interstate commerce. According to the testimony of the business manager for the Petitioner, the cost for labor and materials needed for the Employer to perform the elevated roadway project as a subcontractor for Boh Brothers[8] at the U.S. Corps of Engineers, is at least $125,000. In performing more than $100,000 in work for Boh Brothers, a company itself clearly engaged in interstate commerce, it is concluded that the Employer meets more than the Board's jurisdictional standards.

B. Labor Organization Status

Section 2(5) of the Act defines a labor organization as:

> …any organization of any kind or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

Two characteristics are required for an entity to constitute a labor organization: it must be an organization in which employees participate; and it must exist for the purpose, in whole or in part, of dealing with employers concerning wages, hours and other terms

[8] Boh Brothers is a large, well-known contractor. The Boh Brothers website reflect that, annually, Boh Brothers performs industrial and commercial work valued in excess of $200 million. Boh Brothers employs over 1250

and conditions of employment. Alto Plastics Mfg. Corp., 136 NLRB 850, 851-852 (1962).

The evidence in the record establishes that the Petitioner is an organization in which employees participate which negotiates and administers collective-bargaining agreements with employers concerning grievances, wages, pay, hours, and other terms and conditions of employment of their employees. No record evidence controverts the finding that the Petitioner is a labor organization within the meaning of the Act, and it has been recognized as such by the Board. Based upon the totality of evidence, it is concluded that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

B. The Appropriate Unit

Under Section 9(b) of the Act, the Board has broad discretion to determine "the unit appropriate for the purposes of collective bargaining" in each case "in order to assure employees the fullest freedom in exercising the rights guaranteed by the Act," NLRB v. Action Automotive, Inc., 469 U.S. 490, 494-97 (1985). The Board's discretion extends to selecting an appropriate unit from the range of units which may be appropriate in any given factual setting, and it need not choose the most appropriate unit, American Hospital Association v. NLRB, 499 U.S. 606, 610 (1991); P.J. Dick Contracting, Inc., 290 NLRB 150, 151 (1988). In the instant case, the Petitioner seeks an election within a unit consisting of the cement masons and the apprentice cement masons employed by the Employer.

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employees throughout Texas, Louisiana, Mississippi, Alabama, Florida and Georgia and is clearly directly engaged in interstate commerce under the meaning of the Act.

In determining an appropriate unit, the ultimate question is whether the employees share a sufficient community of interest to warrant their joinder within one unit, Alois Box Co., Inc., 326 NLRB 1177 (1998); Washington Palm, Inc., 314 NLRB 1122, 1127 (1994). In determining whether employees share such a community of interest, the Board weighs a variety of factors, including similarities in wages or methods of compensation; similar hours of work; similar employee benefits; similar supervision; the degree of similar or dissimilar qualifications, training and skills; similarities in job functions; the amount of working time spent away from the facility; the integration of work functions; the degree of interchange between employees as well as the degree of employee contact; and the history of bargaining, NLRB v. Action Automotive Inc., 469 U.S. 490, 494-97 (1985); Kalamazoo Paper Box Corp., 136 NLRB 134, 137 (1962).

In the case at hand, members of the petitioned for unit share common supervision in the personage of the owner as well as the single superintendent. All of the employees posses similar skills and perform similar work. The employees earn hourly wages between $13.00 and $16.00 per hour and they work similar hours.

Accordingly, it is concluded that the cement masons and the apprentice cement masons share a sufficient community of interest to warrant their inclusion in a single unit.

D. The Unit Placement of the Foremen

The statutory definition of a 2(11) supervisor is:

> …any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, ore responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a

> merely routine or clerical nature, but requires the use of independent judgment.

The Union took the position that the foremen are supervisors under Section 2(11) of the Act. The record evidence demonstrates that the foremen have the authority to effectively recommend that employees be hired, fired, and disciplined. The foremen have to tell the superintendent that they are hiring, firing or disciplining employees but the record demonstrates that the foremen have never had one of their recommendations denied. Also, the hourly wages of the foremen are between $20.00 and $25.00 per hour while the hourly wages of the employees are between $13.00 and $16.00 per hour. Furthermore, the foremen have the authority to decide how many employees are to be utilized on each project and to transfer employees between projects. The foremen do not have to get permission from the superintendent to transfer employees from project to project. The foremen can give warnings and/or suspensions to employees without having to seek permission from the superintendent. The Board has found that persons with the power "effectively to recommend" the actions described in Section 2(11) are supervisors within the statutory definition, Entergy Systems & Service, 328 NLRB 902 (1999); Detroit College of Business, 296 NLRB 318 (1989); and Westwood Health Care Center, 330 NLRB 935 (2000). Accordingly, the foremen should be excluded from the unit found appropriate herein inasmuch as they are supervisors as defined by Section 2(11) of the Act.

V. DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned, among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. The

Employer is part of the construction industry when it is engaged in the business of combining labor, materials and constituent parts on a site to form, make or build a structure, Carpet, Linoleum and Soft Tile Local Union No. 1247 (Indio Paint and Rug Center), 156 NLRB 951, 959 (1966). It is clear from the record that the Employer herein is engaged in the construction industry. Therefore, the vote eligibility formula set forth in Daniel Construction, 133 NLRB 264 (1961) as modified, 167 NLRB 1078 (1967) and as reaffirmed by Steiny and Company, 308 NLRB 1323 (1992) is applicable.

Eligible to vote are those employees who:

(a) were employed within the above unit during the payroll period ending immediately preceding the date of this Decision, even if they were ill or on vacation, or

(b) have been employed for a total of 30 days or more within the above unit within a period of 12 months immediately preceding such eligibility date, or

(c) have been employed within the above unit during the 12 months immediately preceding such eligibility date for less than 30 days, but for at least 45 days during the 24 months immediately preceding such eligibility date, and

(d) have not been terminated for cause or quit voluntarily prior to the completion of the last project for which they were employed.

Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In

addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the unit who are in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are former unit employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by the Cement Masons, Local 567, a/w Operative Plasters and Cement Masons International Association of the United States and Canada.

VI. NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices. *Club*

Demonstration Services, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

VII. LIST OF VOTERS

To insure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is directed that 2 copies of an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the undersigned within 7 days from the date of this Decision. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The undersigned shall make this list available to all parties to the election. In order to be timely filed, such list must be received in Region 15's Office, 1515 Poydras Street, Suite 610, New Orleans, Louisiana, on or before **July 13, 2006**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

VIII. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board,

addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by **July 20, 2006**.

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with the Board in Washington, DC. If a party wishes to file one of these documents electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. The guidance can also be found under "E-Gov" on the National Labor Relations Board web site: www.nlrb.gov. If no exceptions are filed to this report, the Board may decide the matter forthwith upon the record or make other disposition of the case.

Dated at New Orleans, Louisiana, this 6th day of July 2006

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Rodney D. Johnson, Regional Director
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Classification Index Codes: 177-8520
240-0167-6700

Date of Issuance: 07/06/06